UPREME COURT. U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 599

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *Appellant*

v.

UNITED STATES OF AMERICA

Appeal From the United States District Court for the Eastern District of Louisiana

BRIEF OPPOSING MOTION TO AFFIRM

R. EMMETT KERRIGAN,
RALPH L. KASKELL, JR.,
Hibernia Bank Building
New Orleans, Louisiana 70112

GEORGE W. WISE
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

Attorneys for Appellant

DEUTSCH, KERRIGAN & STILES,
HOGAN & HARTSON,
Of Counsel

November, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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ARGUMENT

In its motion to affirm, the Government deftly attempts to shift the burden of proof to appellant, by urging affirmance on the ground of the alleged weakness of appellant's showing in opposition to summary judgment. This approach overlooks the fact that on

motion for summary judgment, the burden is on the moving party (in this case, the Government) to establish not only the prima facie truth of the factual allegations on which it relies, but also that there is no genuine issue or dispute as to the truth of any of those allegations. 6 *Moore's Federal Practice* (2d ed.), ¶ 56.15[3].

The Government's motion discloses on its face the paucity of the Government's showing in support of summary judgment. There is no dispute as to the basis on which appellant's dues are assessed or the terms of the quantity-survey contracts. But on the crucial factual issue of whether there was an agreement to include the dues and survey costs in all bids, the Government was able to adduce nothing but debatable inferences based on scattered excerpts from letters written many years ago, which inferences *were controverted* by the documentary evidence including affidavits filed by the appellant.

It is safe to say that no summary judgment has ever been affirmed on such flimsy support.

The *Argument* in the Government's motion to affirm skillfully pretermits any discussion of its own "evidence", and concentrates on the assertion that the appellant entered a "mere denial" rather than "specific facts". If the party moving for summary judgment has failed to conclusively establish not only the truth of his factual allegations but also the absence of a genuine dispute as to any of them, the opposing party is under no burden to file anything in opposition, and summary judgment must be denied on the basis of the inadequacy of the motion therefor. 6 *Moore's Federal Practice* (2d ed.), ¶ 56.15[3] at p. 2339.

The Government's argument on this point also ignores the fact that in addition to the specific sworn denials filed by appellant (and it is hard to see how else it could controvert the existence of an alleged agreement of which no direct evidence was presented), appellant filed contemporaneous documentary evidence negating the inferences sought to be drawn by the Government from the letters written 20 years ago by appellant's then managing director. This evidence consisted of minutes of a 1951 meeting of appellant's board at which its directors took cognizance of these letters and affirmatively disassociated themselves and appellant from the assumptions on which they were based (see motion to affirm, footnote 5*).

The Government's effort to distinguish *United States v. Diebold, Inc.*, 369 U.S. 654, on the ground that it "raised an important and unsettled substantive issue", is unpersuasive. This Court reversed a summary judgment in *Diebold* not because of the substantive issues involved, but because the District Court there, as here, had granted summary judgment on the basis of debatable inferences and the moving party had failed to establish the absence of a genuine issue of material fact.

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* The Department of Justice investigation referred to in this footnote is a 1951 investigation, not the present one.

CONCLUSION

It is again respectfully submitted that *Diebold* justifies summary reversal of the judgment below.

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815 Connecticut Avenue, N. W.
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